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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 Case No. C

12 Plaintiff,

STIPULATED PROTECTIVE ORDER_
FOR COMPLEX LITIGATION

13 v.

14
15 Defendant.
16

17 1. PURPOSES AND LIMITATIONS

18 Disclosure and discovery activity in this action are likely to involve production of
19 confidential, proprietary, or private information for which special protection from public
20 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.
21 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
22 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
23 all disclosures or responses to discovery and that the protection it affords from public disclosure
24 and use extends only to the limited information or items that are entitled under the applicable
25 legal principles to treatment as confidential. The parties further acknowledge, as set forth in
26 Section 10, below, that this Stipulated Protective Order creates no entitlement to file confidential
27 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
28 reflects the standards that will be applied when a party seeks permission from the court to file

1 material under seal.

2 2. DEFINITIONS

3 2.1 Party: any party to this action, including all of its officers, directors,
4 employees, consultants, retained experts, and ~~O~~outside ~~C~~counsel of Record (and their support
5 staff).

6 2.2 Non-Party: any natural person, partnership, corporation, association, or
7 other legal entity not named as a Party to this action.

8 2.2—2.3 Disclosure or Discovery Material: all items or information,
9 regardless of the medium or manner generated, stored, or maintained (including, among other
10 things, testimony, transcripts, or tangible things) that are produced or generated in disclosures or
11 responses to discovery in this matter.

12 2.43 “~~Confidential~~CONFIDENTIAL” Information or Items: information
13 (regardless of how generated, stored or maintained) or tangible things that qualify for protection
14 under standards developed under F.R.Civ.P. 26(c).

15 2.54 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY~~Highly~~
16 ~~Confidential – Attorneys’ Eyes Only~~” Information or Items: extremely sensitive “Confidential
17 Information or Items” whose disclosure to another Party or nonparty would create a substantial
18 risk of serious injury that could not be avoided by less restrictive means.

19 [2.6 Optional – “HIGHLY CONFIDENTIAL – SOURCE CODE” Information
20 or Items: extremely sensitive “Confidential Information or Items” representing computer code
21 and associated comments and revision histories, formulas, engineering specifications, or
22 schematics that define or otherwise describe in detail the algorithms or structure of software or
23 hardware designs whose disclosure to another Party or non-party would create a substantial risk
24 of serious harm that could not be avoided by less restrictive means.]

25 2.75 Receiving Party: a Party that receives Disclosure or Discovery Material
26 from a Producing Party.

27 2.86 Producing Party: a Party or non-party that produces Disclosure or
28 Discovery Material in this action.

1 2.97 Designating Party: a Party or non-party that designates information or
2 items that it produces in disclosures or in responses to discovery as “Confidential” or “Highly
3 Confidential – Attorneys’ Eyes Only.” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE
4 CODE”].

5 2.10 Challenging Party: A Party or Non-Party that challenges the designation of
6 information or items under this Order.

7 2.118 Protected Material: any Disclosure or Discovery Material that is
8 designated as “~~Confidential~~CONFIDENTIAL” or as “~~Highly Confidential – Attorneys’ Eyes~~
9 ~~Only~~HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” [Optional: or as “HIGHLY
10 CONFIDENTIAL – SOURCE CODE”].

11 2.129 Outside Counsel of Record: attorneys who are not employees of a Party
12 but who are retained to represent or advise a Party and have appeared in this action on behalf of
13 that Party or are associated with a law firm which has appeared on behalf of that Party.

14 2.130 House Counsel: attorneys who are employees of a Party. House Counsel
15 does not include any Outside Counsel of Record or any other outside counsel.

16 [2.14 Optional – Designated House Counsel: House Counsel who seek access to
17 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.]

18 2.154 Counsel (without qualifier): Outside Counsel of Record and House
19 Counsel (as well as their support staffs).

20 2.162 Expert: a person with specialized knowledge or experience in a matter
21 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
22 witness or as a consultant in this action and who is not a past or a current employee of a Party or
23 of a competitor of a Party’s and who, at the time of retention, is not anticipated to become an
24 employee of a Party or a competitor of a Party’s. ~~This definition includes a professional jury or~~
25 ~~trial consultant retained in connection with this litigation.~~

26 2.173 Professional Vendors: persons or entities that provide litigation support
27 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
28 organizing, storing, retrieving data in any form or medium; etc.) and their employees and

1 subcontractors.

2 3. SCOPE

3 The protections conferred by this Stipulation and Order cover not only Protected
4 Material (as defined above), but also any information copied or extracted therefrom, as well as all
5 copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or
6 presentations by parties or counsel to or in court or in other settings that might reveal Protected
7 Material. However, the protections conferred by this Stipulation and Order do not cover the
8 following information: (a) any information that at the time of disclosure to a Receiving Party is
9 in the public domain or after its disclosure to a Receiving Party becomes part of the public
10 domain as a result of publication not involving a violation of this Order; or (b) any information
11 known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the
12 disclosure from a source who obtained the information lawfully and under no obligation of
13 confidentiality to the Designating Party. Any use of Protected Material at trial shall be governed
14 by a separate agreement and/or order.

15 4. DURATION

16 Even after ~~the termination~~ final disposition of this litigation, the confidentiality
17 obligations imposed by this Order shall remain in effect until a Designating Party agrees
18 otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be
19 the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; or (2)
20 final judgment herein after the completion and exhaustion all appeals, rehearings, remands, trials
21 or reviews of this action, including the time limits for the filing of any motions or applications
22 for extension of time pursuant to applicable law.

23 5. DESIGNATING PROTECTED MATERIAL

24 5.1 Exercise of Restraint and Care in Designating Material for Protection.

25 Each Party or non-party that designates information or items for protection under this Order must
26 take care to limit any such designation to specific material that qualifies under the appropriate
27 standards. To the extent it is practical to do so, the Designating Party ~~must take care to~~ should
28 designate for protection only those parts of material, documents, items, or oral or written

1 communications that qualify – so that other portions of the material, documents, items, or
2 communications for which protection is not warranted are not swept unjustifiably within the
3 ambit of this Order.

4 Mass, indiscriminate, or routinized designations are prohibited. Designations that
5 are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
6 unnecessarily encumber or retard the case development process, or to impose unnecessary
7 expenses and burdens on other parties), expose the Designating Party to sanctions.

8 If it comes to a Designating Party's ~~or a non-party's~~ attention that information or
9 items that it designated for protection do not qualify for protection at all, or do not qualify for the
10 level of protection initially asserted, that Designating Party ~~or non-party~~ must promptly notify all
11 other parties that it is withdrawing the mistaken designation.

12 5.2 Manner and Timing of Designations. Except as otherwise provided in this
13 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
14 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly
15 so designated before the material is disclosed or produced.

16 Designation in conformity with this Order requires:

17 (a) for information in documentary form ~~(*apart from e.g., paper or electronic*~~
18 ~~documents but not~~ transcripts of depositions or other pretrial or trial proceedings), that the
19 Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
20 ATTORNEYS’ EYES ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”]
21 ~~at the top of~~ each page that contains protected material. If only a portion or portions of the
22 material on a page qualifies for protection, the Producing Party also must clearly identify the
23 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for
24 each portion, the level of protection being asserted ~~(either “CONFIDENTIAL” or “HIGHLY~~
25 ~~CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).~~

26 A Party or non-party that makes original documents or materials available for
27 inspection need not designate them for protection until after the inspecting Party has indicated
28 which material it would like copied and produced. During the inspection and before the

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1 designation, all of the material made available for inspection shall be deemed “HIGHLY
2 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the
3 documents it wants copied and produced, the Producing Party must determine which documents,
4 or portions thereof, qualify for protection under this Order, then, before producing the specified
5 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL” or
6 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) ~~at the top of~~ each page that
7 contains Protected Material. If only a portion or portions of the material on a page qualifies for
8 protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making
9 appropriate markings in the margins) and must specify, for each portion, the level of protection
10 being asserted ~~(either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’~~
11 ~~EYES ONLY”).~~

12 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
13 the Designating Party ~~or non-party offering or sponsoring the testimony~~ identify on the record,
14 before the close of the deposition, hearing, or other proceeding, all protected testimony, and
15 ~~further specify any portions of the testimony that qualify as the level of protection being asserted~~
16 ~~“HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”~~ When it is impractical to
17 identify separately each portion of testimony that is entitled to protection, and when it appears
18 that substantial portions of the testimony may qualify for protection, the Designating Party ~~or~~
19 ~~non-party that sponsors, offers, or gives the testimony~~ may invoke on the record (before the
20 deposition or proceeding is concluded) a right to have up to 21 days to identify the specific
21 portions of the testimony as to which protection is sought and to specify the level of protection
22 being asserted ~~(“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES~~
23 ~~ONLY”).~~

24 Only those portions of the testimony that are appropriately designated for
25 protection within the 21 days shall be covered by the provisions of this Stipulated Protective
26 Order. Alternatively, a Designating Party may specify, at the deposition or up to 21 days
27 afterwards if that period is properly invoked, that the entire transcript shall be treated as
28 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

1 All Parties shall give the other parties notice if they reasonably expect a
2 deposition, hearing or other proceeding to include Protected Material so that the other parties can
3 ensure that individuals present at those proceedings are authorized to be there and have signed the
4 “Agreement To Be Bound by Protective Order.” The use of a document as an exhibit at a
5 deposition shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY
6 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

7 Transcripts containing Protected Material shall have an obvious legend on the title
8 page that the transcript contains Protected Material, and the title page shall be followed by a list
9 of all pages (including line numbers as appropriate) that have been designated as Protected
10 Material and the level of protection being asserted by the Designating Party. The Designating
11 Party shall inform the court reporter of these requirements. Any transcript that is prepared before
12 the expiration of a 21-day period for designation shall be treated during that period as if it had
13 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety
14 unless otherwise agreed, and after the expiration of that period only as actually
15 designated. Transcript pages containing Protected Material must be separately bound by the court
16 reporter, who must affix to the top of each such page the legend “CONFIDENTIAL” or
17 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Party or
18 nonparty offering or sponsoring the witness or presenting the testimony.

19 (c) for information produced in some form other than documentary, and for any
20 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
21 container or containers in which the information or item is stored the legend “CONFIDENTIAL”
22 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” [Optional – or “HIGHLY
23 CONFIDENTIAL – SOURCE CODE”]. If only portions of the information or item warrant
24 protection, the Producing Party, to the extent practicable, shall identify the protected portions,
25 specifying ~~whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’ Eyes~~
26 ~~Only.”~~ the level of protection being asserted.

27 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
28 failure to designate qualified information or items ~~as “Confidential” or “Highly Confidential –~~

1 ~~Attorneys' Eyes Only~~ does not, standing alone, waive the Designating Party's right to secure
2 protection under this Order for such material. ~~If material is appropriately designated as~~
3 ~~"Confidential" or "Highly Confidential Attorneys' Eyes Only" after the material was initially~~
4 ~~produced~~ Upon timely correction of a designation, the Receiving Party, ~~on timely notification of~~
5 ~~the designation~~, must make reasonable efforts to assure that the material is treated in accordance
6 with the provisions of this Order.

7 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

8 6.1 Timing of Challenges. ~~Any person or entity~~ Party or Non-Party may
9 challenge a designation of confidentiality at any time. Unless a prompt challenge to a
10 Designating Party's confidentiality designation is necessary to avoid foreseeable substantial
11 unfairness, unnecessary economic burdens, or a later significant disruption or delay of the
12 litigation, a Party does not waive its right to challenge a confidentiality designation by electing
13 not to mount a challenge promptly after the original designation is disclosed.

14 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
15 resolution process by providing written notice of each designation it is challenging and describing
16 the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the
17 written notice must recite that the challenge to confidentiality is being made according to this
18 specific paragraph of the Protective Order. A Party that elects to initiate a challenge to a
19 Designating Party's confidentiality designation must do so ~~The parties shall attempt to resolve~~
20 each challenge in good faith and must begin the process by conferring directly within fourteen
21 days of the date of service of notice (in voice to voice dialogue; other forms of communication
22 are not sufficient) ~~with counsel for the Designating Party~~. In conferring, the ~~C~~challenging Party
23 must explain the basis for its belief that the confidentiality designation was not proper and must
24 give the Designating Party an opportunity to review the designated material, to reconsider the
25 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
26 designation. A ~~C~~challenging Party may proceed to the next stage of the challenge process only if
27 it has engaged in this meet and confer process first or establishes that the Designating Party is
28 unwilling to participate in the meet and confer process in a timely manner.

1 6.3 Judicial Intervention. ~~A Party~~If the Parties cannot resolve a challenge
2 ~~without court intervention, that elects to press a challenge to a confidentiality designation after~~
3 ~~considering the justification offered by~~ the Designating Party ~~may~~ shall file and serve a motion
4 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) ~~that~~
5 ~~identifies the challenged material and sets forth in detail the basis for the challenge~~to retain
6 ~~confidentiality within 21~~ ~~court~~ days of the initial notice of challenge ~~or within fourteen days of~~
7 ~~the parties agreeing that the meet and confer process will not resolve their dispute.~~¹ Each such
8 motion must be accompanied by a competent declaration that affirms that the movant has
9 complied with the meet and confer requirements imposed in the preceding paragraph ~~and that sets~~
10 ~~forth with specificity the justification for the confidentiality designation that was given by the~~
11 ~~Designating Party in the meet and confer dialogue.~~ Failure by the Designating Party to make
12 ~~such a motion or to file such declaration within 21 days shall automatically waive the~~
13 ~~confidentiality designation for each challenged designation.~~ Notwithstanding this provision, the
14 ~~C~~challenging Party may file a motion challenging a confidentiality designation at any time if
15 ~~there is good cause for doing so, including a challenge to the designation of a deposition~~
16 ~~transcript or any portions thereof. Any motion brought pursuant to this provision must be~~
17 ~~accompanied by a competent declaration affirming that the movant has complied with the meet~~
18 ~~and confer requirements imposed by the preceding paragraph.~~

19 The burden of persuasion in any such challenge proceeding shall be on the
20 Designating Party. ~~Frivolous challenges, or those made for an improper purpose (e.g., to harass~~
21 ~~or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party~~
22 ~~to sanctions.~~ Until the court rules on the challenge, all parties shall continue to afford the material
23 in question the level of protection to which it is entitled under the Producing Party's designation.

24 7. ACCESS TO AND USE OF PROTECTED MATERIAL

25 7.1 Basic Principles. A Receiving Party may use Protected Material that is
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27 ¹ ~~Alternative: It may be appropriate in certain circumstances for the parties to agree to shift the~~
28 ~~burden to move on the Challenging Party after a certain number of challenges are made to avoid~~
~~an abuse of the process. The burden of persuasion would remain on the Designating Party.~~

1 disclosed or produced by another Party or by a non-party in connection with this case only for
2 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
3 disclosed only to the categories of persons and under the conditions described in this Order.
4 When the litigation has been terminated, a Receiving Party must comply with the provisions of
5 section ~~44~~15, below (FINAL DISPOSITION).

6 Protected Material must be stored and maintained by a Receiving Party at a
7 location and in a secure manner² that ensures that access is limited to the persons authorized
8 under this Order.

9 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
10 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
11 disclose any information or item designated CONFIDENTIAL only to:

12 (a) the Receiving Party’s Outside Counsel of ~~R~~ecord in this action, as well as
13 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
14 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
15 hereto as Exhibit A;

16 (b) the officers, directors, and employees (including House Counsel) of the
17 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
18 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

19 (c) ~~E~~xperts (as defined in this Order) of the Receiving Party to whom disclosure
20 is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
21 Protective Order” (Exhibit A);

22 (d) the Court and its personnel;

23 (e) court reporters, their staffs, professional jury or trial consultants, and
24 ~~P~~rofessional ~~V~~endors to whom disclosure is reasonably necessary for this litigation and who
25 have signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

26 (f) during their depositions, witnesses in the action to whom disclosure is
27

28 ² It may be appropriate under certain circumstances to require the Receiving Party to store any
electronic Protected Material in password-protected form.

1 reasonably necessary and who have signed the “Agreement to Be Bound by Protective Order”
2 (Exhibit A) unless otherwise agreed by the Designating Party or ordered by the Court. Pages of
3 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
4 separately bound by the court reporter and may not be disclosed to anyone except as permitted
5 under this Stipulated Protective Order.

6 (g) the author or recipient of ~~the a~~ document containing the information or a
7 person who otherwise possessed or knew or the original source of the information.

8 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
9 ONLY” [Optional – and “HIGHLY CONFIDENTIAL – SOURCE CODE”] Information or
10 Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a
11 Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL –
12 ATTORNEYS’ EYES ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”]
13 only to:

14 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as
15 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
16 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
17 hereto as Exhibit A;

18 [(b) – *Optional – as deemed appropriate in case-specific circumstances:*
19 Designated House Counsel of a Receiving Party³ (1) who has no involvement in competitive
20 decision-making ~~or in patent prosecutions involving _____~~ [specify subject matter
21 areas], (2) to whom disclosure is reasonably necessary for this litigation, and (3) who has signed
22 the “Agreement to Be Bound by Protective Order” (Exhibit A), and (4) as to whom the
23 procedures set forth in paragraph 7.4(a)(1), below, have been followed];⁴

24 ³ It may be appropriate under certain circumstances to limit the number of Designated House
25 Counsel who may access “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
26 information under this provision.

27 ⁴ This Order contemplates that Designated House Counsel would not have access to any
28 “HIGHLY CONFIDENTIAL – SOURCE CODE.” It may also be appropriate under certain
circumstances to limit how Designated House Counsel may access “HIGHLY CONFIDENTIAL
– ATTORNEYS’ EYES ONLY” information. For example, Designated House Counsel may be
limited to viewing “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information
only if it is filed with the Court under seal, or in the presence of Outside Counsel of Record at

(c) Experts ~~(as defined in this Order)~~ of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A), ~~[Optional]~~ and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been followed];

(d) the Court and its personnel;

(e) court reporters, their staffs, professional jury or trial consultants,⁵ and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A); and

(f) the author of ~~the a~~ document containing the information or a person who otherwise possessed or knew or the original source of the information.

~~[Optional: —7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”] Information or Items to Designated House Counsel⁶ or “Experts” or House Counsel⁷~~

~~(a)(1) Unless otherwise ordered by the court or agreed in writing by the Designating Party, a Party that seeks to disclose to Designated House Counsel any information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to paragraph 7.3(b) first must make a written request to the Designating Party that (1) sets forth the full name of the Designated House Counsel and the city and state of his or her residence, and (2) describes the Designated House Counsel’s current and reasonably foreseeable future primary job duties and responsibilities in sufficient detail to determine if House Counsel is their offices.~~

⁵ Alternative: The parties may wish to allow disclosure of information not only to professional jury or trial consultants, but also to mock jurors, to further trial preparation. In that situation, the parties may wish to draft a simplified, precisely tailored Undertaking for mock jurors to sign.

⁶ Alternative: The parties may exchange names of a certain number of Designated House Counsel instead of following this procedure.

⁷ Alternative: “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information or items may be disclosed to an Expert without disclosure of the identity of the Expert as long as the Expert is not a current officer, director, or employee of a competitor of a party or anticipated to become one.

1 involved, or may become involved, in any competitive decision-making.⁸

2 (a)(2) Unless otherwise ordered by the court or agreed in writing by the
3 Designating Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any
4 information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’
5 EYES ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”] pursuant to
6 paragraph 7.3(c) first must make a written request to the Designating Party that (1) identifies the
7 specific-general categories of HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
8 [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”] information that the Receiving
9 Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the
10 city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume,
11 (4) identifies the Expert’s current employer(s), (5) identifies each person or entity from whom the
12 Expert has received compensation or funding for work in his or her areas of expertise or to whom
13 the expert has provided professional services, including in connection with a litigation, at any
14 time during the preceding five years,⁹ and (6) identifies (by name and number of the case, filing
15 date, and location of court) any litigation in connection with which the Expert has offered expert
16 testimony, including through a declaration or report or at a deposition or trial, during the
17 preceding five years.¹⁰

18 (b) A Party that makes a request and provides the information specified in the
19 preceding respective paragraphs may disclose the subject Protected Material to the identified
20 Designated House Counsel or Expert unless, within seven-fourteen court days of delivering the

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22 ⁸ It may be appropriate in certain circumstances to require any Designated House Counsel who
23 receives “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information pursuant to
24 this Order to disclose any relevant changes in job duties or responsibilities prior to final
disposition of the litigation to allow the Designating Party to evaluate any later-arising
competitive decision-making responsibilities.

25 ⁹ If the Expert believes any of this information is subject to a confidentiality obligation to a third-
26 party, then the Expert should provide whatever information the Expert believes can be disclosed
without violating any confidentiality agreements, and the Party seeking to disclose to the Expert
shall be available to meet and confer with the Designating Party regarding any such engagement.

27 ¹⁰ It may be appropriate in certain circumstances to restrict the Expert from undertaking certain
28 limited work prior to the termination of the litigation that could foreseeably result in an improper
use of the Designating Party’s “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
information.

request, the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

(c) A Party that receives a timely written objection must meet and confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement within ~~five~~ seven court days of the written objection. If no agreement is reached, the Party seeking to make the disclosure to Designated House Counsel or the Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) seeking permission from the court to do so. Any such motion must describe the circumstances with specificity, set forth in detail the reasons for which the disclosure to Designated House Counsel or the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail and suggest any additional means that might be used to reduce that risk. In addition, any such motion must be accompanied by a competent declaration in which the movant describes the parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and sets forth the reasons advanced by the Designating Party for its refusal to approve the disclosure.

In any such proceeding the Party opposing disclosure to Designated House Counsel or the Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

8. PROSECUTION BAR [Optional]. Absent the written consent of the Producing Party, any individual who receives access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" [Optional – or "HIGHLY CONFIDENTIAL – SOURCE CODE"] information shall not be involved in the prosecution of patents or patent applications relating to [insert subject matter of the invention and of highly confidential technical information to be produced], including without limitation the patents asserted in this action and any patent or application claiming priority to or otherwise related to the patents asserted in this action, before any foreign or domestic agency, including the United States Patent and Trademark Office ("the Patent

Office”).¹¹ For purposes of this paragraph, “prosecution” includes directly or indirectly drafting, amending, advising or otherwise affecting the scope or maintenance of patent claims.¹² To avoid any doubt, “prosecution” as used in this paragraph does not include representing a party challenging a patent before a domestic or foreign agency (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes* reexamination). This Prosecution Bar shall begin when access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”] information is first received by the affected individual, and shall end two (2) years after final termination of this action.¹³

9. SOURCE CODE [Optional].

(a) To the extent production of Source Code becomes necessary in this case, a Producing Party may designate Source Code as “HIGHLY CONFIDENTIAL - SOURCE CODE” if it comprises or includes confidential, proprietary and/or trade secret Source Code.

(b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information [Optional: including the Prosecution Bar set forth in Paragraph 13], and may be disclosed solely to the individuals to whom “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs 7.3 and 7.4, with the exception of Designated House Counsel.¹⁴

(c) Any Source Code produced in discovery shall be made available for inspection in

¹¹ It may be appropriate under certain circumstances to require Outside and House Counsel who receive access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information to implement an “Ethical Wall.”

¹² Prosecution would include, for example, original prosecution, reissue and reexamination proceedings.

¹³ Alternative: It may be appropriate for the Prosecution Bar to apply only to individuals who receive access to another party’s “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” technical or Source Code information pursuant to this Order, such as under circumstances where one or more parties is not expected to produce “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information that is technical in nature or “HIGHLY CONFIDENTIAL – SOURCE CODE” information.

¹⁴ It may be appropriate under certain circumstances to allow House Counsel access to derivative materials including “HIGHLY CONFIDENTIAL - SOURCE CODE” information, such as exhibits to motions or expert reports.

1 a format through which it could be reasonably reviewed and searched during normal business
2 hours or other mutually agreeable times at an office of the Producing Party's counsel or another
3 mutually agreed location.¹⁵ The Source Code shall be made available for inspection on a secured
4 computer in a secured room without Internet access or network access to other computers, and the
5 Receiving Party shall not copy, remove, or otherwise transfer any portion of the Source Code
6 onto any recordable media or recordable device. The Producing Party may visually monitor the
7 activities of the Receiving Party's representatives during any Source Code review, but only to
8 ensure that there is no unauthorized recording, copying, or transmission of the Source Code.¹⁶

9 (d) The Receiving Party shall be allowed to request paper copies of limited portions of
10 Source Code that are reasonably necessary for the preparation of court filings, pleadings, expert
11 reports or other papers or for deposition or trial, but shall not request paper copies for purposes of
12 reviewing the Source Code elsewhere instead of reviewing it electronically as set forth in
13 paragraph (c) in the first instance. The Producing Party shall provide all such Source Code in
14 paper form including bates numbers and the label "HIGHLY CONFIDENTIAL - SOURCE
15 CODE." The Producing Party may challenge the amount of Source Code requested in hard copy
16 form pursuant to the timeframes set forth in the dispute resolution procedures of Paragraph 6
17 whereby the Producing Party is the "Challenging Party" and the Receiving Party is the
18 "Designating Party" for purposes of dispute resolution.

19 (e) The Receiving Party shall maintain a record of any individual who has
20 inspected any portion of the Source Code in electronic or paper form. The Receiving Party shall
21 maintain all paper copies of any printed portions of the Source Code in a secured, locked area.
22 The Receiving Party shall not create any electronic or other images of the paper copies and shall

23
24 ¹⁵ Alternative: Any Source Code produced in discovery shall be made available for inspection in
25 a format through which it could be reasonably reviewed and searched during normal business
26 hours or other mutually agreeable times at a location that is reasonably convenient for the
27 Receiving Party and any experts to whom the Source Code may be disclosed. This alternative
28 may be appropriate if the Producing Party and/or its counsel are located in a different jurisdiction
than counsel and/or experts for the Receiving Party.

¹⁶ It may be appropriate under certain circumstances to require the Receiving Party to keep a
paper log indicating the names of any individuals inspecting the source code and dates and times
of inspection, and the names of any individuals to whom paper copies of portions of Source Code
are provided.

1 not convert any of the information contained in the paper copies into any electronic format. The
2 Receiving Party shall only make additional paper copies if such additional copies are (1)
3 necessary to prepare court filings, pleadings, or other papers (including a testifying expert's
4 expert report), (2) necessary for deposition, or (3) otherwise necessary for the preparation of its
5 case. Any paper copies used during a deposition shall be retrieved by the Producing Party at the
6 end of each day, and must not be given to or left with a Court Reporter or any other individual.¹⁷

7 108. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
8 OTHER LITIGATION.

9 If a ~~Receiving~~ Party is served with a subpoena or an order issued in other litigation
10 that would compel disclosure of any information or items designated in this action as
11 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY;" [Optional
12 – or "HIGHLY CONFIDENTIAL – SOURCE CODE"] the ~~Receiving~~ Party must:

13 (a) so promptly notify in writing the Designating Party, in writing (by fax, if
14 possible) immediately and in no event more than three court days after receiving the subpoena or
15 order. Such notification must include a copy of the subpoena or court order.

16
17 (b) The Receiving Party also must immediately promptly notify in writing
18 the Party who caused the subpoena or order to issue in the other litigation that some or all the
19 material covered by the subpoena or order is the subject of this Protective Order. In addition, the
20 Receiving Party must deliver Such notification shall include a copy of this Stipulated Protective
21 Order ~~promptly to the Party in the other action that caused the subpoena or order to issue; and~~

22 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
23 Designating Party whose Protected Material may be affected.¹⁸

24
25 ¹⁷ The nature of the Source Code at issue in a particular case may warrant additional protections
26 or restrictions. For example, it may be appropriate under certain circumstances to require the
27 Receiving Party to provide notice to the Producing Party before including "HIGHLY
28 CONFIDENTIAL – SOURCE CODE" information in a court filing, pleading, or expert report.

¹⁸ The purpose of imposing these duties is to alert the interested parties to the existence of this
Protective Order and to afford the Designating Party in this case an opportunity to try to protect
its confidentiality interests in the court from which the subpoena or order issued.

1 If the Designating Party timely seeks a protective order, the Party served with the
2 subpoena or order shall not produce any information designated in this action as
3 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [Optional
4 – or “HIGHLY CONFIDENTIAL – SOURCE CODE”] before a determination by the court from
5 which the subpoena or order issued or obtaining the Designating Party’s permission. The
6 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its
7 confidential material – and nothing in these provisions should be construed as authorizing or
8 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
10 PRODUCED IN THIS LITIGATION.

11 (a) The purpose of imposing these duties is to alert the interested parties to the
12 existence of this Protective Order and to afford the Designating Party in this case an opportunity
13 to try to protect its confidentiality interests in the court from which the subpoena or order issued.
14 The Designating Party shall bear the burdens and the expenses of seeking protection in that court
15 of its confidential material – and nothing in these provisions should be construed as authorizing or
16 encouraging a Receiving Party in this action to disobey a lawful directive from another court. The
17 terms of this Order are applicable to information produced by a non-party in this action and
18 designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
19 ONLY” [Optional – or “HIGHLY CONFIDENTIAL – SOURCE CODE”], and such information
20 produced by non-parties in connection with this litigation is protected by the remedies and relief
21 provided by this Order. Nothing in these provisions should be construed as prohibiting a non-
22 party from seeking additional protections.

23 (b) In the event that a Party is required by a valid discovery request to produce
24 a non-party’s confidential information in its possession and the Party is subject to an agreement
25 with the non-party not to produce the non-party’s confidential information, then the Party shall:

26 1. promptly notify in writing the Requesting Party and the non-party
27 that some or all the confidential information requested is subject to the confidentiality rights of a
28 non-party;

1 2. promptly provide the non-party with a copy of the Stipulated
2 Protective Order in this litigation, the relevant discovery request(s), and a reasonably particular
3 description of the information requested; and

4 3. make the information requested available for inspection by the non-
5 party.

6 (c) If the non-party fails to object or seek a protective order from this Court
7 within fourteen days of receiving the notice and accompanying information, the Receiving Party
8 may produce the non-party's confidential information responsive to the discovery request. If the
9 non-party timely seeks a protective order, the Receiving Party shall not produce any information
10 in its possession or control that is subject to the confidentiality rights of the non-party.¹⁹ Absent a
11 Court order to the contrary, the Non-Party shall bear the burden and expense of seeking
12 protection in this Court of its Protected Material.

13 129. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL If a
14 Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to
15 any person or in any circumstance not authorized under this Stipulated Protective Order, the
16 Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
17 disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the
18 person or persons to whom unauthorized disclosures were made of all the terms of this Order, and
19 (d) request such person or persons to execute the "Acknowledgment and Agreement to Be
20 Bound" that is attached hereto as Exhibit A.

21 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
22 PROTECTED MATERIAL. When a producing party gives notice to the other parties that certain
23 inadvertently produced material is subject to a claim of privilege or other protection, the
24 obligations of the parties that received such material are those set forth in Rule 26(b)(5)(B) of the
25 Federal Rules of Civil Procedure.²⁰ This provision is not intended to modify whatever procedure

26 ¹⁹ The purpose of this provision is to alert the interested parties to the existence of confidentiality
27 rights of a non-party and to afford the interested parties an opportunity to protect their
28 confidentiality interests in this Court.

²⁰ Alternative: The parties may agree that the recipient of an inadvertent production may not
"sequester" or in any way use the document(s) pending resolution of a challenge to the claim of

1 may be established in an e-discovery order that provides for production without prior privilege
2 review.

3 140. FILING PROTECTED MATERIAL. Without written permission from the
4 Designating Party or a court order secured after appropriate notice to all interested persons, a
5 Party may not file in the public record in this action any Protected Material. A Party that seeks to
6 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected
7 material may only be filed under seal pursuant to a Court order authorizing the sealing of the
8 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue
9 only upon a request establishing that the Protected Material at issue is privileged or protectable as
10 a trade secret or otherwise entitled to protection under the law.

11 151. FINAL DISPOSITION. ~~Unless otherwise ordered or agreed in writing by the~~
12 ~~Producing Party, w~~Within sixty days after the final ~~termination-disposition~~ of this action, ~~as~~
13 ~~defined in paragraph 4,~~ each Receiving Party must return all Protected Material to the Producing
14 Party or destroy such material. As used in this subdivision, “all Protected Material” includes all
15 copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of
16 the Protected Material. ~~With permission in writing from the Designating Party, the Receiving~~
17 ~~Party may destroy some or all of the Protected Material instead of returning it.~~ Whether the
18 Protected Material is returned or destroyed, the Receiving Party must submit a written
19 certification to the Producing Party (and, if not the same person or entity, to the Designating
20 Party) by the sixty day deadline that identifies (by category, where appropriate) all the Protected
21 Material that was returned or destroyed and that affirms that the Receiving Party has not retained
22 any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of

23 privilege or other protection to the extent it would be otherwise allowed by Rule 26(b)(5)(B) as
24 amended in 2006. This could include a restriction against “presenting” the document(s) to the
25 Court to challenge the privilege claim as may otherwise be allowed under Rule 26(b)(5)(B)
subject to ethical obligations.

26 An alternate provision could state: “If information is produced in discovery that is subject to a
27 claim of privilege or of protection as trial-preparation material, the party making the claim may
28 notify any party that received the information of the claim and the basis for it. After being
notified, a party must promptly return or destroy the specified information and any copies it has
and may not sequester, use or disclose the information until the claim is resolved. This includes a
restriction against presenting the information to the Court for a determination of the claim.”

1 the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival
2 copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda,
3 correspondence, deposition and trial exhibits, expert reports,~~or~~ attorney work product and
4 consultant and expert work product, even if such materials contain Protected Material. Any such
5 archival copies that contain or constitute Protected Material remain subject to this Protective
6 Order as set forth in Section 4 (DURATION), above.

7 ~~12~~16. MISCELLANEOUS

8 ~~16~~2.1 Right to Further Relief. Nothing in this Order abridges the right of any
9 person to seek its modification by the Court in the future.

10 ~~12~~16.2 Right to Assert Other Objections. By stipulating to the entry of this
11 Protective Order no Party waives any right it otherwise would have to object to disclosing or
12 producing any information or item on any ground not addressed in this Stipulated Protective
13 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
14 the material covered by this Protective Order.

15 ~~16~~3 – Optional – Export Control. Disclosure of Protected Material shall be
16 subject to all applicable laws and regulations relating to the export of technical data contained in
17 such Protected Material, including the release of such technical data to foreign persons or
18 nationals in the United States or elsewhere. The Producing Party shall be responsible for
19 identifying any such controlled technical data and the Receiving Party shall take such measures
20 necessary to ensure compliance.]

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26 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

27 DATED: _____
28 Attorneys for Plaintiff

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DATED: _____
Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: _____
[name of judge]
United States District/Magistrate Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury that I have read
in its entirety and understand the Stipulated Protective Order that was issued by the United States
District Court for the Northern District of California on [date] in the case of _____ **[insert
formal name of the case and the number and initials assigned to it by the court]**. I agree to
comply with and to be bound by all the terms of this Stipulated Protective Order and I understand
and acknowledge that failure to so comply could expose me to sanctions and punishment in the
nature of contempt. I solemnly promise that I will not disclose in any manner any information or
item that is subject to this Stipulated Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for
the Northern District of California for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone
number] as my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]

Proposed Changes Not Reflected in the Redline

The Committee proposes reorganizing the sections of the Model Order to provide a more cohesive order that is easier to navigate. The following order of sections is recommended: (1) Purposes and Limitations; (2) Definitions; (3) Scope; (4) Duration; (5) Designating Protected Material; (6) Challenging Confidentiality Designations; (7) Access to And Use of Protected Material; (8) Prosecution Bar; (9) Source Code; (10) Protected Material Subpoenaed or Ordered Produced in Other Litigation; (11) A Non-Party's Protected Material Sought to Be Produced in This Litigation; (12) Unauthorized Disclosure of Protected Material; (13) Inadvertent Production of Privileged or Otherwise Protected Material; (14) Miscellaneous (including Filing Protected Material and Export Control as subsections); (15) Final Disposition.

The Committee also proposes listing definitions alphabetically. These organizations are not implemented in the Committee's redline of the current Model Order so that other recommendations are easier to view.